No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H. A. ARTISTS & ASSOCIATES, INC., *et al.*,
Petitioners,

v.

ACTORS' EQUITY ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
815 Fifteenth Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037
(Of Counsel)

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 104 national and international unions with a total membership of 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

We agree with respondents that the present case is controlled by *Federation of Musicians* v. *Carroll*, 391 U.S. 99, 113 (1968) because a union's licensing of agents, who effectively control job opportunities and otherwise act as intermediaries between workers and employers, with respect to

the sale of its members' labor is shielded by the statutory labor exemption from the antitrust laws. Moreover, we also agree with respondents that the statutory exemption is available here because this is not a case like *Allen Bradley* v. *Union,* 325 U.S. 797 (1965), in which there was an employer-union conspiracy aimed at driving other employers out of a product market so that the resulting economic advantage gained by the employer-conspirators might "trickle down" to the union workers. While each of respondents' points is sufficient to compel affirmance of the decision below, labor's historic concern with the use of the antitrust laws as a device to stifle legitimate and indispensable efforts to protect working conditions prompts us to file this brief which presents yet additional grounds for affirmance.

ARGUMENT

Introduction

Petitioners present this case to the Court as if the central issue were the lawfulness under the Sherman Act of agreements between Actors' Equity and certain theatrical agents. On that premise, petitioners ask the Court to decide whether those agreements fall within the labor exemption to the antitrust laws. But as we show first, most petitioners are not signatories to those agreements and are in no way restrained by the agreements. The only issue those petitioners are entitled to raise concerns the lawfulness of certain unilateral union conduct. And, the basic holding of *United States* v. *Hutcheson,* 321 U.S. 219 (1941) decides that issue against those petitioners. We then demonstrate that the correct answer to the "agreement" question the few remaining petitioners pose is that the agreements are lawful because: (1) they are limited to the "labor market" and excluded from the Sherman Act by § 6 of the Clayton Act; and (2) even if there is an impact on competition in a product market covered by the Sherman Act, the "nonstatutory" exemption protects the agreements.

I

As the District Court noted, "most" of the petitioners are not party to any agreement with Actors' Equity. 478 F. Supp. 496, 499. The gravamen of their complaint against Actors' Equity is that the union disciplines members who seek employment through any theatrical agent who is unwilling to abide by the restrictions established by Actors' Equity through its agent regulation. Petitioners term the promulgation and enforcement of that rule a "group boycott." But whatever the epithet attached to the course of conduct followed by Actors' Equity, one critical fact cannot be obscured: the non-signatory petitioners' challenge is to entirely *unilateral union conduct in the union's self-interest.*

The agent regulation promulgated by Actors' Equity embodies that organization's considered response to the hazards its members face in an overpopulated labor market characterized by short-term jobs in which "an actor [seeking employment] without an agent does not have the same opportunity to be taken seriously as an actor who has an agent." 478 F. Supp. at 497. The regulation provides, in essence, that actors may pay an agent's commission of up to ten percent of salary so long as that payment does not result in the actor receiving less than the minimum wage negotiated by the union, that agents must meet the fiduciary obligations inherent in an agency relationship and that agents may not use their economic leverage to lock an actor into an unreasonable exclusive agreement.

These restrictions meet a common problem—the vulnerability of those seeking work in a highly-competitive casual labor market—by substituting for individual weakness group strength in the form of a collective decision designed to order the competition for jobs in that market. Further, Actors' Equity decided *on its own* to safeguard its members who are seeking jobs by issuing the protective provisions included in the rule; the union decided *on its own* to license agents who agree to abide by the rule; and the

union decided *on its own* to discipline its members who deal with unlicensed agents. The finding of the District Court, not disturbed by the Court of Appeals, was that there is

> * * * no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and * * * Theatrical Artists Representatives Association ("TARA") a trade association of agents working in the legitimate theatre field * * * or between Actors' Equity and producers. The Actors' Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members. [478 F.Supp. at 498-99.]

This finding establishes that this case, in contrast to *Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), does not concern a situation in which a union, in league with some employers, takes particular action against other employers.

Thus, with regard to most of the petitioners, the license agreements between Actors' Equity and agents who have agreed to abide by the agent regulation are red herrings. The majority of the petitioners are agents who have *not* signed such an agreement. The substance of the agreements other agents have signed does not restrain those petitioners who have not signed such agreements. Nor have the nonsignatory petitioners shown that the existence of such agreements in itself adversely affects them. As a matter of logic and of law, then, the sole complaint of the nonsignatory petitioners is that Actors' Equity, on its own, has determined to discipline its members who seek employment through agents who do not agree to comply with the agent regulation. It is this "boycott"—and *not* any agreement—that the nonsignatory petitioners contend precludes them from the market and thus restrains their trade. But the applicability of the labor exemption to such unilateral union conduct is clear. This much was settled forty years ago in *United States* v. *Hutcheson*, 312 U.S. 219 (1941), where the Court, in an opinion by Mr. Justice Frankfurter, held as follows:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or the wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. [*Id.* at 232.]

Hutcheson thus teaches that workers are free to decide collectively to withhold their services—to boycott—in pursuit of union objectives (such as those here), and that the antitrust laws do not apply to such union conduct. And that principle has been reaffirmed by this Court in every subsequent labor exemption case including most recently in *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 621-22 (1975):

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

With regard to the petitioners who have declined to sign a licensing agreement, that well-settled proposition dictates the conclusion, reached by the courts below, that the labor exemption protects the conduct of Actors' Equity.

II

A few petitioners apparently did sign agreements with Actors' Equity. Those petitioners—and only those petitioners—do have the claim that they are unlawfully restrained by the terms to which they agreed. But as we now

show this challenge must fail because the agreements at most restrain competition in a labor market and thus are exempted from antitrust scrutiny by § 6 of the Clayton Act.

It is instructive that throughout their brief petitioners never stop to identify the product market which allegedly is being restrained by the agreements made by the respondent union. Petitioners do, of course, contend that they are independent businessmen, and that the union is regulating the conduct of their business in a manner which violates the Sherman Act. But petitioners pass by the question of whether their business is within the protection of that statute. The answer is that it is not so protected.

Section 1 of the Sherman Act declares in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act likewise gears its prohibition of monopolization to

> any part of the trade or commerce among the several States, or with foreign nations * * *.

But the first sentence of § 6 of the Clayton Act provides:

> That the labor of a human being is not a commodity or article of commerce.

The "business" of the petitioner theatrical agents is precisely to deal in the labor of human beings—actors and actresses—in securing employment for them and in negotiating and policing the terms and other working conditions through which these performers are compensated for that labor. Thus, despite the considerable controversy concerning the legal effect of § 6 (and particularly its elaborate second sentence), it is incontrovertible that the first sentence of that section takes the business of theatrical agents

(and others who deal in the labor of human beings) out of the antitrust laws by excluding them from the "commerce" which the Sherman Act protects.

That this portion of § 6 is to be accorded its full force is confirmed—if confirmation be necessary—by its sponsor's explanation of his language. What is now the first sentence of § 6 was proposed on the floor of the Senate by Senator Cummins as part of a comprehensive amendment to the section.[1] Senator Cummins explained the import of the first sentence of his amendment as follows:

> I precede the amendment I have offered with the statement that ought to be in the law somewhere, for it would solve many of the problems which have vexed the courts and vexed those who have discussed the question, namely, that the labor of a human being is not a commodity or article of commerce. It is high time that we recognize the difference between the power of a man to produce something and the thing which he produces. Society has the right to regulate the sale and the transportation of the thing produced, but society has no right, according to our views of civilization, to say that a man who has the capacity to work shall work. He is free to either work or to abstain from working. He is free to persuade others to abstain from working. The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital and their transportations throughout the country we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the

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[1] 2 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, 2366 (1978).

> wages for which they work shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly.[2]

While the Cummins amendment was defeated,[3] the manager of the bill immediately thereafter proposed to add the first sentence of the amendment to the bill, and the Senate concurred.[4] Senator Cummins' words thus represent the definitive statement of Congressional intent.

Referring to § 6, the Court declared in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503 (1940):

> [I]t would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Regulation of a theatrical agent who acts as an intermediary between an employee and an employer concerning a job, is a form of "restraint on the sale of the employee's services to the employer" and thus, by virtue of § 6, not a combination or conspiracy in restraint of "trade or commerce" under the Sherman Act.

Nothing in this Court's subsequent decisions has undermined the authority of the foregoing passage in *Apex Hosiery*. In *Allen Bradley* the Court limited the *second* sentence of § 6 when it held that

> "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices." [325 U.S. at 808] [5]

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[2] *Id.* at 2367.

[3] *Id.* at 2378.

[4] *Id.* at 2378-79.

[5] At an earlier stage in the analysis the entire § 6 is quoted (325 U.S. 803-04, n. 9) and that provision is paraphrased in the text at 804.

But *Allen Bradley* did not vitiate the force of *Apex Hosiery's* interpretation of the first sentence of §6.

In *United States* v. *Real Estate Boards,* 339 U.S. 485, the Court determined that a combination and conspiracy to fix the commission rates of real estate brokers in the sale, exchange, lease and management of real property in the District of Columbia was a violation of § 3 of the Sherman Act. In deciding the case in favor of the defendant brokers, the district court "seemingly [had been] influenced" by § 6, including the provision that the labor of a human being is not a commodity or article of commerce. *See* 339 U.S. at 489. In rejecting that analysis this Court said:

> But we think it a misconception to assimilate the services involved here to those of employees or to compare the present case to those involving the application of the antitrust laws to labor unions. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469; *United States* v. *Hutcheson,* 312 U.S. 219. We do not have here any more than we did in *American Medical Assn.* v. *United States,* 317 U.S. 519, or *United States* v. *Women's Sportswear Mfrs. Assn.* 336 U.S. 460, cf. *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143, an aspect of the employee-employer relationship to which the antitrust laws have made special concessions. [339 U.S. at 489-490] [6]

In *Radovich* v. *National Football League,* 352 U.S. 445, plaintiff alleged that he had been blacklisted by the defendant football league and its member clubs as part of a conspiracy to destroy the All America Conference, a competitive professional football league in which Radovich once played. As the final argument in its brief the National Foot-

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[6] The principal issue in *Real Estate Boards* was whether the defendant real estate brokers were engaged in a "trade" within the meaning of § 3 of the Sherman Act, a question which the Court answered in the affirmative. *Id.* at 489-492.

ball League asserted that

> The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim For Relief Set Out in the Complaint [7]

In the course of that argument the NFL relied, *inter alia*, on § 6, and the paragraph of the *Apex Hosiery* case from which we quoted at p. 8, *supra*.[8] In holding that the complaint was sufficient to state a cause of action the Court did not discuss respondents' reliance on the Clayton and Norris-LaGuardia Acts. The point may have been deemed too insubstantial to mention because of the complaint's allegations regarding monopolization of the football industry, or because the point was not properly before the Court, as petitioner had pointed out:

> The labor law issue presented by respondents was neither raised in the Court of Appeals below or in opposition to the petitioner's writ for certiorari.[9]

Against this background we believe it would be improper to read *Radovich* as *sub silentio* imposing a novel limitation on § 6 or overruling the construction of that provision in *Apex Hosiery*.

Nowhere in their brief do petitioners address § 6 of the Clayton Act. The omission is well-advised, since the terms of that provision remove them from the protection of the Sherman Act. Petitioners are not in a product market protected by the Sherman Act, and the challenged regulations are exclusively in the labor market. The complexities which have confronted this Court in other cases in which labor union activities have been challenged under the Sherman Act thus are simply not present here.

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[7] Brief for Respondent *National Football League, et al.*, No. 94, Oct. Term, p. 59 (heading).

[8] *Id.*, pp. 61-62.

[9] *Id.*, Reply Br. for Pet., p. 20.

III.

Even if this case were properly viewed as involving agreements in a product market between a labor and non-labor group, the result would be unchanged. For even on that assumption, the agreements here—like the agreement in *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) (and unlike the agreements in e.g., *Allen Bradley* and *Connell*) — would fall within the "limited nonstatutory exemption from antitrust sanctions" afforded "some agreements between unions and nonlabor parties." *Connell Co., supra*, 421 U.S. at 622.

By their terms, § 20 of the Clayton Act and § 4 of the Norris-LaGuardia Act exempt from the reach of the Sherman Act certain specified union actions during a labor dispute. Those sections do not "expressly deal [] with arrangements or agreements between unions and employers," as the Court observed in *Pennington*, 381 U.S. at 662. Yet, as *Pennington* itself makes plain, certain such agreements are squarely within the labor exemption. For the policy animating those provisions, and animating § 6 of the Clayton Act as well, requires what the Court has termed a "nonstatutory" exemption for certain agreements between labor and non-labor groups.

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Co.*, 421 U.S. at 622. The Court has recognized that there is a tension between this "labor policy" favoring collective action to regulate labor markets and the policy of the antitrust laws which favors price competition to regulate product markets, since "successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards." *Apex Hosiery Co., supra* 310 U.S. at 503. From *Apex Hosiery* to *Connell*, therefore,

the Court consistently "has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions." *Connell Co., supra,* 421 U.S. at 622. As Chief Justice Stone put it in *Apex Hosiery,* the "elimination of price competition based on differences in labor standards • • • has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04.

Determining whether a particular agreement between labor and nonlabor parties qualifies for the nonstatutory exemption thus "is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Jewel Tea Co., supra,* 381 U.S. at 689. The accommodation the Court has arrived at in its decisions since *Apex Hosiery* is this: Where an agreement is of "immediate and legitimate concern to union members," (*Jewel Tea Co., supra,* 381 U.S. at 692), and where "the effect on the product market • • • results from the elimination of competition based on wages [or working conditions]," (*Pennington, supra,* 381 U.S. at 664), the agreement is exempt from antitrust liability. Conversely, where an agreement is not responsive to an "immediate and legitimate concern" of a union and imposes a "direct restraint on the business market [which] would not follow naturally from the elimination of competition over wages and working conditions" (*Connell Co., supra,* 421 U.S. at 625), the agreement is not exempt.

In *Pennington,* the Court applied this analysis to distinguish between agreements fixing the price at which an employer sells his product — agreements which are not exempt from antitrust scrutiny—and agreements fixing the wages employers pay their employees—agreements which are exempt. Agreements which themselves establish prices of a product, the Court stated, do not qualify for antitrust immunity even if prompted by a union's desire "to protect its wage scale by maintaining employer income," because "the restraint on the product market is direct and im-

mediate * * * and the unions get from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663.[10] Wage agreements, in contrast, are plainly lawful, even when consummated with a multi-employer unit comprised of horizontal competitors, as "the union benefit * * * is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit." *Id.* at 664.

Similarly, in *Jewel Tea,* the Court viewed agreements concerning hours of work and agreements establishing marketing hours as posing distinct antitrust issues. The Court readily concluded that an agreement regulating when employees may work would fall within the nonstatutory exemption, for "although the effect on commerce is apparent and real, perhaps more so than in the case of wage agreements, the concern of union members is immediate and direct." 381 U.S. at 691. As to the agreement prohibiting night operation of meat departments, however, the Court concluded that the applicability of the nonstatutory exemption depended on the resolution of "a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible?" *Id.* at 694. If so, the agreement restricting night operations would not be exempt, for "the obvious restraint on the product market * * * would stand alone, unmitigated and unjustified by the vital interests of the union butchers." *Id.* at 692. If, on the other hand, night operations "would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the

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[10] An agreement which, in form, is addressed to prices can nonetheless in substance approximate a wage agreement, and thus be exempt: "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members." *Jewel Tea, supra,* 381 U.S. at 690 n. 5.

butchers' workload," then the agreement restricting night operations would be lawful, "for then operating hours, like working hours, would constitute a subject of immediate and legitimate concern to union members." *Id.* Since the district court had resolved this factual dispute in the unions' favor (and since the findings were not clearly erroneous), this Court upheld the lawfulness of the marketing hours agreement.

Finally, in *Connell,* the Court applied the same analysis in finding not exempt an agreement reached outside of a collective bargaining relationship which prohibited an employer from subcontracting to nonunion firms. The Court recognized that the union's aim in seeking the agreement—"organizing as many subcontractors as possible"—"was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers fact from nonunion firms." 421 U.S. at 625. But the Court found the particular means the union had adopted—securing agreements which absolutely barred subcontracting—impermissible because "This kind of direct restraint on the business market has substantial anticompetitive effects * * * that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* The Court elaborated:

> The agreements with Connell and other general contractors indiscriminately excluded nonunion sub-contractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. * * * [T]he restriction on subcontracting would eliminate competition on all subjects . . . even on subjects unrelated to wages, hours, and working conditions. [*Id.* at 623-24]

Implicit in *Connell* is the proposition that if the agreement had done nothing more than eliminate competition over wages and working conditions—if, for example, the union

had secured Connell's promise not to subcontract with firms paying "substandard wages"—the agreement would have been exempt from antitrust liability.

Here, as in *Jewel Tea* (and unlike *Connell*), the findings of the district court (which were not disturbed by the court of appeals) establish that the agreements between Actors' Equity and theatrical agents further "a subject of immediate and legitimate concern to union members" and do no more than restrain wage competition.[11] Consequently, the agreements fall within the nonstatutory exemption.

The critical fact in this case, as found by the district court, is that in the theatrical industry agents play a central role in securing employment for actors:

> As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent who may have a greater chance of gaining an audition for his client.
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> • • •
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> Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment. [478 F. Supp. at 497, 502.]

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[11] The primary import of the agent regulation and of the agreements under it—and the primary challenge to those agreements—is their impact on the commissions of agents. Although the regulation has certain other provisions (*e.g.*, requiring agents to meet their fiduciary obligations) we, like the courts below and like petitioners in this Court, focus on the provisions of the regulation addressed to commissions.

Given that role, it follows that for actors, obtaining employment is a two-step process: first, the actor secures an agent, and second, the agent secures a job for the actor with a producer. Wage competition among actors can occur at either step in the process, and the union has an "immediate and direct" interest in seeking to eliminate such competition at each step. The collective bargaining agreements between Actors' Equity and the producers limit wage competition at the second step by establishing a floor for wages; the effect of the producers' agreement not to pay wages below the floor is, of course, to preclude Equity members from selling their services to producers below the floor. But absent additional action by Actors' Equity, wage competition among members still could occur at the first step of the employment-securing process: actors could compete with respect to the percentage of their wages they were willing to cede to an agent in order to be accepted by the agent as a client. The agreements at issue limit such competition by establishing a ceiling on commissions for agents (which ceiling also serves as a floor below which actors cannot sell their services to agents); the agents' commitment not to charge commissions above the ceiling precludes actors from selling their services to agents for less than the rates established by the agreements. The agreements thus serve the most vital of interests of the union since, as the court of appeals recognized, "the union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 651.

In short, any restraint on the agents' product market (still assuming, contrary to our showing in Part II, that agents have such a market) is no greater than necessary to eliminate wage competition among actors. Unlike the situations in *Allen Bradley* and *Connell*, and the allegations in *Pennington*, no employer has been foreclosed from the market by virtue of the agreements at issue here; to the contrary, the district court found that "Actors' Equity has invited [petitioners] to become refranchised, but [petitioners] have

decided to remain unfranchised." 478 F. Supp. at 499. Nor is this a case in which the union was active in aid of an employer conspiracy to fix the price of goods and services or otherwise to restrain competition for goods and services in order to obtain the indirect benefit that the favored employers would be able to pay higher wages or provide more jobs to union members when competition from employers was eliminated.[12] And finally, the agreements here do not foreclose competition in any respect other than to place a cap on the commissions agents may charge. That cap, of course, is the very device which restrains *wage* competition.

The agreements here, then, are analytically indistinguishable from the agreement involved in *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959) fixing the price trucking companies would pay truck drivers for the lease of their vehicles. In *Jewel Tea* the Court explained *Oliver* thusly:

> Though in form a scheme fixing prices for the supply of leased vehicles, the agreement [in *Oliver*] was designed "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.* at 293-294. As the agreement did not embody a " 'remote and indirect approach to the subject of wages' . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *id.*, at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law. [381 U.S. at 690 n. 5]

[12] In Justice Jackson's characteristically pungent phrase, this is not a case in which the "benefits to organized labor" are being "utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *U.S.* v. *Women's Sportswear Manufacturers Assn.*, 336 U.S. 460, 464 (1949), citing *Allen Bradley*. *See also Pennington*, *supra*, 381 U.S. at 663, quoted at p. 12, *supra*.

Oliver is especially relevant here—and petitioners' failure to discuss it especially significant—because it completely disposes of petitioners' recurring refrain that the existence of a collectively-bargained wage scale for actors obviates the union's interest in regulating agents. In *Oliver* the union had negotiated a wage scale for truck drivers. But the Court recognized that the union retained a vital interest in regulating truck rental fees, since absent such regulation an owner-driver could engage in wage competition by charging a "rental which did not cover his operating costs" and "mak[ing] up his excess costs from his driver's wages." 358 U.S. at 294. Similarly, here, the existence of a wage agreement with the *producers* is not alone sufficient to eliminate wage competition among actors in seeking *agents*, and thus does not diminish the union's interest in regulating agents.

Oliver likewise disposes of petitioners suggestion (Br. at 25) that the licensing agreements here stand on the same footing as an agreement which fixes "the price a producer charges for admission to his play." [13] An agreement with a producer over ticket prices would, in the words of *Oliver*, constitute at best a "*remote and indirect* approach to the subject of wages"; as the Court stated in *Pennington*, the union would "get from the promise nothing more concrete than a hope for better wages to come." In contrast, the licensing agreements here represent "a *direct frontal attack* upon a problem thought to threaten the maintenance of the basic wage structure," namely, the danger of wage

[13] Petitioners' further suggestion (Br. at 23-24) that to uphold the agreements here the Court would have to permit agreements which fix the prices of anyone whose "activities affect actors' disposable income" is even more far-fetched. The union here seeks to regulate agents *not* because they "affect actors' disposable income," but because agents—unlike landlords, grocers and the like—control access to employment for actors. Regulation of agents prevents wage competition among actors; regulation of, e.g., landlords would not.

competition occurring among actors in seeking agents. And since the licensing agreements affect price competition only by restraining wage competition, their lawfulness is established by the unbroken line of decisions from *Apex Hosiery* to *Connell*.[14]

CONCLUSION

For the reasons stated above as well as for those stated in the brief for the respondents, the decision below should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
815 Fifteenth Street, N.W.
Washington. D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037
(Of Counsel)

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

[14] That the agreements here are not collective bargaining agreements with employers of Actors' Equity members does not alter the conclusion. While collective bargaining agreements are particularly strong candidates for protection by the "nonstatutory exemption" because of the "federal policy favoring collective bargaining," *Connell, supra,* 421 U.S. at 626, the nonstatutory exemption can extend to any agreement not covered by the "statutory" exemption, *viz.* to any agreement with a "non-labor" party. Indeed, the thrust of the Norris-LaGuardia Act was to make clear that labor's antitrust exemption was not limited to situations in which an employer-employee relationship exists, and thus to overrule decisions such as *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921).

In *Connell* the company and union which had signed the agreement in question had no collective-bargaining relationship, yet the Court did not view that fact as dispositive. Rather, Connell's agreement not to subcontract with nonunion firms was found unlawful because of its anticompetitive effects, see p. 14, *supra*. The Court's entire analysis of the effects of the agreement would not have been necessary were the "nonstatutory" exemption available only to collective bargaining agreements.